
(2014) 07 KL CK 0020
In the High Court Of Kerala
Case No : Ins. A. No. 58 of 2012

Bharat Hotel

APPELLANT

Vs

Regional Director

RESPONDENT

Date of Decision : 23-07-2014

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(13), 2(13A), 2(22), 2(9), 39(4)
Industrial Disputes Act, 1947 — Section 2(s)

Citation : (2014) 143 FLR 685 : (2014) 3 KHC 571 : (2014) LabIC 3862 :
(2014) 4 LLJ 616

Hon'ble Judges : B. Kemal Pasha, J

Bench : Single Bench

Advocate : U.K. Ramakrishnan, Senior Advocate, P. Ramakrishnan, U.K. Devidas and Prinsun Philip, Advocate for the Appellant; T.V. Ajayakumar, Standing Counsel, Advocate for the Respondent

Judgement

B. Kemal Pasha, J.—(1) Whether "stipend" being disbursed by a Trainer to the Trainee can be categorized as "wages" within the meaning of Section 2(22) of the Employees' State Insurance Act ("ESI Act" for short)?

(2) Whether amounts being disbursed as "Performance Allowance" to the employees can be categorized as "wages" within the meaning of Section 2(22) of the ESI Act? These are the questions of law coming up for consideration in this appeal.

The appellant, M/s. Bharath Hotel, D.H. Road, Ernakulam, have been conducting a Training Centre for imparting training for persons to become hotel employees in the field of catering, house keeping, working at the reception etc.. They use to give stipend to such trainees. The Employees' State Insurance Corporation ("ESI Corporation" for short) has passed Ext. P5 order under Section 45A of the ESI Act, by which the appellant was directed to pay contribution to the ESI Corporation on the total amount disbursed by way of stipend to such trainees. Further, through Ext. P5 order, they were also directed to pay contribution on the

amount being paid as "performance allowance" also. Initially, the appellant challenged Ext. P5 order before the Court below through IC No. 32/2002. The Court below allowed the IC by holding that Ext. P5 is unsustainable. Aggrieved by the same, the ESI Corporation has preferred an appeal as Ins. Appeal 37 of 2007 before this Court. This Court found that the ESI Act being a beneficial legislation to the employees, representative of the employees should also have been heard in the matter after impleading them. For such a proper hearing and disposal, the matter was remitted to the Court below, after setting aside the order passed by the Court below. The matter was re-numbered as IC No. 8/2011 before the Court below. The Court below, through the impugned judgment, dismissed the IC. The applicant before the Court below has come up in appeal.

2. Heard the learned Senior Counsel Sri U.K. Ramakrishnan for the appellant and the learned Standing Counsel for the ESI Corporation Sri T.V. Ajayakumar.

3. Admittedly, Ext. P5 order is one passed under Section 45A of the ESI Act. The learned Senior Counsel has invited the attention of this Court to Section 2(9) of the ESI Act, which deals with "employees". The said provision as it then stood till 20/10/1989, did not contain the inclusive portion "or any person engaged as apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961)". The aforesaid terms were included as an amendment with effect from 20/10/1989 in the said provision. Presently, Section 2(9) of the ESI Act reads:

"S. 2(9).-- "employee" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and--

(i) who is directly employed by the principal employer, on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere; or

(ii) who is employed by or through an immediate employer, on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or

(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service;

and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment of any person engaged as apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961)....."

4. The learned Senior Counsel has argued that even though such terms have been incorporated in Section 2(9) of the ESI Act through an amendment, no consequential amendments have been carried out in other related provisions of the ESI Act. It has to be noted that unlike the terms "employees employed for wages", what has been included through the amendment in Section 2(9) is the terms "any person engaged as apprentice". Section 2(13) defines "immediate employer". In that provision also, the terms used are "employees employed". Similarly, in Section 2(13A), "insurable employment" is defined as "an employment in a factory or establishment.....". There also, the word used is "employment" and not "as engagement". In Section 39(4) also, the terms used are "an employee is employed.....". Similarly, in Sections 40, 41(1), 41(1A) and 41(2) also the terms used are "employee employed".

5. The learned Senior Counsel has argued that when amendment was carried out in Section 2(9) of the ESI Act, similar amendment should have been carried out with regard to the definition of "wages" as contained in Section 2(22) of the ESI Act also. Even though the amendment incorporating the inclusive portion with regard to "any person engaged as apprentice" has been incorporated in Section 2(9) of the Act, it seems that no consequential amendments were made in Section 2(22) of the ESI Act. In Section 2(22) of the ESI Act, "wages" has been defined:

""wages" means all remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled and includes any payment to an employee in respect of any period of authorized leave, lock-out, strike which is not illegal or lay-off and other additional remuneration, if any, paid at intervals not exceeding two months, but does not include--

(a) any contribution paid by the employer to any pension fund or provident fund, or under this Act;

(b) any travelling allowance or the value of any travelling concession;

(c) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or

(d) any gratuity payable on discharge."

6. The said definition clause has four parts. The first part is "remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled". The second part is the inclusion of "any payment to an employee in respect of any period of authorised leave, lock-out, strike, which is not illegal or lay-off. The third part is with regard to the inclusion of "other additional remuneration, if any, paid at intervals not exceeding two months". The fourth part is with regard to the exclusion of items (a) to (d) whereby certain specified payments have been excluded from the category of additional remuneration. It seems that as far as Section 2(22) is concerned, the

"remuneration paid or payable" is applicable only as far as part 1 and 2 are concerned; but, with regard to part 3, what is applicable is "other additional remuneration, if any, paid. Therefore, it is evident that the Legislature has intended with regard to the applicability of additional remuneration to be included within the definition of "wages", only when such an additional remuneration is paid. Whereas, as far as the remuneration to an employee coming within the first part is concerned, it need not always be paid. The said provision is applicable even in a case wherein such remuneration is payable.

7. The learned Senior Counsel has invited the attention of this Court to the decision in *Tungabhadra Sugar Works (P) Limited Vs. Labour Court, Mangalore and Another*, which clearly deals with the definition of workman as contained in Section 2(s) of the Industrial Disputes Act, 1947, which, according to me, cannot be extended to the definition of "employee" within the meaning of Section 2(9) of the ESI Act. The learned Senior Counsel has invited the attention of this Court to the decision in *President, K.P. Co-operative Society v. Regional Director, E.S.I. Corporation, Trichur and Another* 1975 KHC 94 : 1975 KLT 670 (DB) : ILR 1975 (2) Ker. 284. True that it is a decision that was rendered prior to the aforesaid amendment in Section 2(9) of the ESI Act. It is further true that it was in the backdrop of the absence of such terms in Section 2(9) of the ESI Act, a Division Bench of this Court had considered the issue with regard to an apprentice in that case. At the same time, paragraph 4 of the decision noted supra shows that the discussions made therein were quite independent of the discussions with regard to Section 2(9) of the ESI Act. In paragraph 4 of *President, K.P. Co-operative Society (supra)*, it was held that the term "employment" denotes a larger concept than what is denoted by the term "engagement". One cannot say that the said observation was made by the Division Bench of this Court on the unamended provisions of Section 2(9) of the ESI Act. The said finding is totally independent of such discussion.

8. It was further held in paragraph 4 of *President, K.P. Co-operative Society (supra)* that "an apprentice is allowed to work in order that he may learn the trade. In fact, he is a student and the premises are his training ground. Even if he is paid any allowance, it would not be "wages" as the term is defined in Section 2(22) of the Act for such wages should be remuneration paid or payable in terms of the conditions of employment". It seems that even the said finding entered by the Division Bench of this Court is also quite independent of the discussions made with regard to the definition of "employee" as then contained in Section 2(9) of the ESI Act. It was further held therein that the idea with regard to payment is that it is the remuneration which the person executing the work can claim as of right for the work he does.

9. The learned Senior Counsel for the appellant has argued that by merely incorporating an amendment by including the terms "any person engaged as apprentice" under Section 2(9) of the ESI Act, the Legislature cannot compel one to read the definition of wages in Section 2(22) as one including "amount paid to

an apprentice as stipend also."

10. Even according to the learned Standing Counsel, the payment deployed as stipend to an apprentice or a trainee, as the case may be, will fall within the first part of Section 2(22) of the ESI Act. The first Part of Section 2(22) specifically deals with remuneration paid or payable in cash to an employee, if the terms of the contract of employment express or implied, were fulfilled. Therefore, the ingredients of the first part of Section 2(22) clearly says that there should be "a contract of employment either express or implied. In cases wherein there is a contract of employment, either express or implied is there, if any remuneration is paid or payable, such employer is bound to pay contribution on that amount. The question is whether a contract of employment is there as far as a trainee is concerned. As far as the trainees are concerned there can be a contract of apprenticeship. Can a contract of apprenticeship or training be construed as a contract of employment? It seems that the Legislature has incorporated the terms "any person engaged as apprentice" in Section 2(9) of the ESI Act. It seems that, if as a matter of fact, the Legislature had the intention to treat a contract of apprenticeship or a contract of training in equal status of a contract of employment, definitely such words would have been incorporated even in Section 2(9) of the ESI Act. Even if such terms are not incorporated in Section 2(9), the Legislature ought to have carried out necessary amendments for interpreting such terms in Section 2(22) of the ESI Act.

11. In the case of trainees, if, as a part of their curriculum, some practical works are also entrusted to those trainees, at any stretch of imagination, it cannot be said that those trainees are employed by the trainer. In the absence of any specific contract for such an employment of a trainee for doing specified works in the establishment, it cannot be said that such practical training being imparted to a trainee as part of the curriculum should be treated as employment within the meaning of Section 2(9) or Section 2(22) of the ESI Act.

12. As this Court has noted earlier regarding the discussions with regard to the term "employee" as contained in Section 2(9) of the ESI Act, the terms "employment and engagement" were dealt with by the Division Bench of this Court in *President, K.P. Co-operative Society (supra)* wherein it was categorically held that "employment" denotes a larger concept than what is denoted by the term "engagement". When the Legislature has chosen to incorporate the word "engage" in Section 2(9) so as to bring apprentices also within the category of "employees" as contained in Section 2(9) of the ESI Act, similar wordings should have been incorporated in Section 2(22) also in order to rope in the amount of stipend being disbursed to such trainees who are engaged, as wages within the meaning of Section 2(22) of the ESI Act.

13. Training cannot be imparted merely through academic exercises. In cases of training relating to catering etc., if it is imparted only through academic means, it is as good as attempting to teach a person how to swim by standing on the land. Therefore, by imparting some practical works as part of the curriculum, the

status of such apprentices or trainees will never assume the proportion of a normal employee. That is why, the Legislature has worded in the inclusive definition that "any person engaged as apprentice". The Legislature has in its wisdom decided that an apprentice cannot be employed whereas an apprentice can only be engaged. Therefore, the same cannot extend automatically to the terms "contract of employment" as contained in Section 2(22) of the ESI Act, unless it is amended in such a way so as to include a contract for engaging a trainee or apprentice. It cannot be said that through the amendment carried out in Section 2(9) of the ESI Act, one has to automatically read the terms "contract of employment" as a "contract of engaging a trainee or apprentice" also. If such terms are automatically imported by the Court in Section 2(9) of the ESI Act, I am afraid that, it amounts to judicial legislation which is quite uncalled for.

14. The learned Standing Counsel for the ESI Corporation has invited the attention of this Court to the principles of statutory interpretations by Justice G.P. Singh and argued that when two provisions in the Statute are to be construed, even if it prima facie gives different meanings, it should be construed harmoniously. True, it is the golden rule of interpretation that construction and interpretation should be in such way in order to suppress the mischief and to advance the remedy. But, here in this particular case, Section 2(22) of the ESI Act stands as it originally stood even prior to the amendment in Section 2(9) of the ESI Act. When the Legislature has chosen to amend the inclusive definition in Section 2(9) of the ESI Act, the Legislature ought to have carried out necessary amendments at least in Section 2(22) of the ESI Act.

15. The learned Standing Counsel for the ESI Corporation has argued that if Section 2(22) is considered as one not which includes the stipend being deployed to a trainee or apprentice, the amendment carried out in Section 2(9) of the ESI Act becomes otiose. The same is not the concern of this Court; whereas it should be the concern of the Legislature. There is no reason to discard the argument forwarded by the learned Senior Counsel that Section 2(22) which clearly deals with a contract of employment does not take in a contract of engaging a trainee or apprentice.

16. The learned Standing Counsel for the ESI Corporation has brought the attention of this Court to P. Ramanatha Aiyar's Advanced Law Lexicon with regard to the contract of employment. In page 1029 of Vol-I, it is stated that the expression of contract of employment implies an employer, an employee and a contract therefore. The learned Standing Counsel for the ESI Corporation further relies on the decision in Chintaman Rao and Another Vs. The State of Madhya Pradesh, wherein it was held:

"The concept of employment involves three ingredients: (1) employer (2) employee and (3) the contract of employment. The employer is one who employs, i.e., one who engages the services of other persons. The employee is one who works for another for hire. The employment is the contract of service between the employer and the employee whereunder the employee agrees to

serve the employer subject to his control and supervision."

The learned Standing Counsel for the ESI Corporation is harping upon the terms "employer is one who employs i.e., one who engages services of other persons". There, in fact, the Apex Court has used the term engages, independently, in its literal sense of the term. The same was not decided in connection with the terms "any other person engaged as apprentice" which was incorporated through the amendment of 1989 in Section 2(9) of the ESI Act. It further seems that the Apex Court has not distinguished or differentiated the terms "employment and engagement".

17. Attention of this Court has been invited to the decision in *Bombay Anand Bhavan Restaurant Vs. The Deputy Director, ESI Corporation and Another*, wherein it was held in paragraph 20:

"The Employees" State Insurance Act is a beneficial legislation. The main purpose of the enactment as the Preamble suggests, is to provide for certain benefits to employees of a factory in case of sickness, maternity and employment injury and to make provision for certain other matters in relation thereto. The Employees" State Insurance Act is a social security legislation and the canons of interpreting a social legislation are different from the canons of interpretation of taxation law. The Courts must not countenance any subterfuge which would defeat the provisions of social legislation and the Courts must even, if necessary, strain the language of the Act in order to achieve the purpose which the legislation had in placing this legislation on the Statute book. The Act, therefore, must receive a liberal construction so as to promote its objects."

18. Finally, the learned Standing Counsel for the ESI Corporation has attempted to fortify his argument by relying on the decision of the Queen's Bench Division reported in 1968 Lab. I.C. 1302 wherein it was held:

"A contract of service exists if these three conditions are fulfilled: (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master; (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master (iii) The other provisions of the contract are consistent with its being a contract of service. An obligation to do work subject to other party's control, is, however, a necessary, though not always a sufficient, condition of a contract of service."

19. The learned Standing Counsel for the ESI Corporation relies on the decision in *Transport Corporation of India Vs. Employees" State Insurance Corpn. and Another*, wherein it was held:

"Before parting with the discussion on this point, it is necessary to keep in view the salient fact that the Act is a beneficial piece of legislation intended to provide benefits to employees in case of sickness, maternity, employment injury and for certain other matters in relation thereto. It is enacted with a view to ensuring

social welfare and for providing safe insurance cover to employees who were likely to suffer from various physical illnesses during the course of their employment. Such a beneficial piece of legislation has to be construed in its correct perspective so as to fructify the legislative intention underlying its enactment. When two views are possible on its applicability to a given set of employees, that view, which furthers the legislative intention should be preferred to the one which would frustrate it."

The observations in paragraph 28 of the decision noted supra clearly reveal that the said observations were made when the words used in a Section are capable of two constructions. It is trite that the ESI Act is a social welfare legislation eyeing on the beneficial enjoyment of employees. When two constructions are possible, the one in favour of such beneficiaries should be preferred. At the same time, the terms "contract of employment" contained in Section 2(22) of the ESI Act is not capable of giving two interpretations. When it is stated as "contract of employment", it cannot be treated as a contract by which an apprentice is engaged. True, that it is a legislative omission. Through an interpretation or construction, the Court is not expected to supply or import such a meaning to the terms "contract of employment" in Section 2(22) of the ESI Act.

20. Even if the stipend is payable to a trainee or an apprentice, and in the course of his training as part of the curriculum he is engaged in a practical training, it cannot be said that the stipend was deployed as a remuneration for the work done by the said person who was engaged in the practical training. Therefore, the stipend being deployed to a trainee or an apprentice cannot be treated as wages within the meaning of Section 2(22) of the ESI Act as it stands now. It is true that if an amendment is not carried out in Section 2(22) of the ESI Act, the amendment already carried out in Section 2(9) of the ESI Act, as noted above, will become otiose. It is for the Legislature to make suitable amendment in Section 2(22) of the ESI Act in order to make it in tune with Section 2(9) of the ESI Act.

21. Regarding performance allowance, the learned Senior Counsel has pointed out that as such performance allowance is not being paid as a condition of service, and especially when it is being paid just as an inam or gift, it cannot form additional remuneration within the meaning of Section 2(22), especially when the employee has no right to claim the same as of right. It has been argued that at any point of time, the appellant can stop such payment or deny such payment to anybody. If it comes within the purview of the first part of the definition of "wages" as contained in Section 2(22) of the ESI Act, even without any payment, the ESI Corporation could have claimed contribution on such payment, as it was payable. It is true that even according to the learned Senior Counsel for the appellant, such performance allowance is not payable. When the Legislature has carefully worded the third part of Section 2(22) and limited the inclusive portion to additional remuneration paid, there is no meaning in arguing that it is not payable as of right and the employee cannot claim it as of right.

True that the ESI Corporation has no case that the performance allowance is payable through the contract of employment either express or implied. Even when such a payment is specifically noted in the contract of employment as additional remuneration, it squarely falls within the category of the third part of the definition of "wages" as contained in Section 2(22) of the ESI Act, only when such payment is made.

22. The learned Senior Counsel has invited the attention of this Court to the decision in *Dy. Director, Employees' State Insurance Corporation Vs. Traco Cable Company Ltd.*, wherein the management was constrained to pay incentive based on the production given by the workers. In that case, it was held that, additional remuneration paid under the third part of Section 2(22) need not be based on any contract of employment. Even without a contract, if any such additional remuneration has been paid by styling it as an incentive, it is additional remuneration within the meaning of the third part of Section 2(22) of the ESI Act on which contribution has to be paid. The said decision has been cited by the learned Senior counsel in order to fortify his proposition that in that case an incentive was paid as additional remuneration, on the basis of a contract between the union as well as the management. Whether such a contract is there or not, if any amount is actually paid as incentive for more work done on the basis of the performance of such an employee, it will come within the category of additional remuneration paid within the meaning of the third part of Section 2(22) of the ESI Act.

23. The learned Senior Counsel relies on the decision of the Madras High Court in *Employees' State Insurance Corporation v. Enfield India Ltd.* 1994 Lab. IC 2507, wherein it was held in paragraph 7 that "as per the terms of the agreement between the management and the employees Union, which provides for incentive and plant performance bonus, the employees cannot claim these two as of right and even if the performance index has been lowered due to want of work or other causes, over which the employees have no control resulting in reduction of these bonuses, they cannot claim the same as of right contending that they were not responsible for the reduction in the performance. I do not think that, that observation made by the Madras High Court has any application to the facts and circumstance of this case. The attention of this Court has been invited to the decision in *M/s. Whirlpool of India Ltd. Vs. Employees' State Insurance Corporation*, wherein it was held,

"Under first part of Section 2(22), all the remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled would be "wages". Under this part neither the actual payment nor when the payment is made is of any relevance. The last part of Section 2(22) relates to payment of additional remuneration. The additional remuneration, if any paid at intervals not exceeding two months and not falling in Clauses (a) to (d) would also be wages within the meaning of the term as defined. Under this part of the definition, there has to be payment and not only payability and the

payment has to be at intervals not exceeding two months."

24. It seems that the learned Senior Counsel is harping upon the term "only" used in the last sentence of the said paragraph to argue that there has to be payment of such remuneration and not only payability and the payment has to be done at intervals not exceeding two months. The learned Standing Counsel for the ESI Corporation has invited the attention of this Court to the decision in Harihar Polyfibres Vs. Regional Director, ESI Corporation, . It seems that the Apex Court has relied on the decision in Harihar Polyfibres (supra) in paragraph 11 of Whirlpool of India Ltd. (supra). In Whirlpool of India Ltd. (supra), apart from a passing remark with regard to the payment that "not only payability it has to be paid", no other discussions on that point is there whereas, in Harihar Polyfibres (supra) the said aspect has been considered in detail with a threadbare discussion on all aspects. In paragraph 2 of Harihar Polyfibres (supra), it was held,

"Therefore wages as defined includes remuneration paid or payable under the terms of the contract of employment, express or implied but further extends to other additional remuneration if any, paid at intervals not exceeding two months, though outside the terms of employment, Thus remuneration paid under the term; of the contract of the employment (express or implied) or otherwise if paid at intervals not exceeding two months is wages. The interposition of the Clause "and includes any payment to an employee in respect of any period of authorised leave, lock-out, strike which is not illegal or layoff" between the first Clause, "all remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, was fulfilled" and the third Clause, "other additional remuneration, if any, paid at intervals not exceeding two months", makes it abundantly clear that while "remuneration" under the first Clause has to be under a contract of employment, express, or implied, "remuneration" under the third Clause need not be under the contract of employment but may be any "additional remuneration" outside the contract of employment."

25. In Harihar Polyfibres (supra), it was categorically held that the remuneration paid under the terms of the contract of employment or otherwise if paid at intervals not exceeding two months, it will be an additional remuneration within the meaning of Section 2(22) of the ESI Act. Reliance was placed in the said decision on a Full Bench decision of the Andhra Pradesh High Court in Employees' State Insurance Corporation, Hyderabad Vs. Andhra Pradesh Paper Mills Ltd., Rajahmundry, , wherein it was held,

"It must be emphasised at this stage that under the third part of the definition of "wages" it is actual factum of payment which counts because the word used is "paid" as distinguished from "paid or payable". The moment you get any additional remuneration other than the remuneration payable under the contract of employment and if this additional remuneration is paid at intervals not exceeding two months, it becomes wages by virtue of the third part of the definition of "wages"."

As is evident from paragraph 5 of Harihar Polyfibres (supra), the Apex Court has fully relied on the aforesaid dictum of the Full Bench of the Andhra Pradesh High Court. Much discussion is not required to conclude that performance allowance is nothing but an additional remuneration. Even though it has been argued that it is an allowance being paid purely at the discretion of the management to the employees as an incentive, it seems that the same is being paid as an incentive for better performance from such employees. To each and every employee, such a payment is not being made. Such a payment is being made, by assessing the performance and output of the employees. When such an incentive is being paid by expecting better performance on account of the better output by certain employees, it is nothing but an additional remuneration paid within the meaning of the third part of Section 2(22) of the ESI Act. Therefore, it comes within the category of "wages" whether it is being paid through a contract of employment or otherwise. Therefore, the appellant is bound to pay contribution on such performance allowance.

In the result, this appeal is allowed in part and that part of Ext. P5 order, which deals with stipend being deployed to the trainees or apprentices, is declared as unsustainable and unenforceable.